IN THE SUPREME COURT OF FLORIDA
CASE # SC09-1401

ZENAIDA GOMEZ,
Petitioner,

v.

VILLAGE OF PINECREST,
Respondent.

Petitioner, Zenaida Gomez' Initial Brief on the Merits

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Statement of the Case

On January 17, 2008, the Village of Pinecrest ("Village") seized real property belonging to the Petitioner, Zenaida Gomez ("Mrs. Gomez") located at 9101 S.W. 69th Court, Pinecrest, Florida ("the property"). On January 28, 2008, Mrs. Gomez demanded an adversarial preliminary hearing ("APH") and it was set for hearing on February 11, 2008. At the conclusion of the APH, the trial court entered a seizure order against the property. On February 20, 2008, Mrs. Gomez appealed that APH/seizure order to the Third District Court of Appeals. On, July 1, 2009, the Third District Court of Appeals affirmed the trial court.

On August 3, 2009, Mrs. Gomez filed her (amended) petition invoking the discretionary jurisdiction of the Florida Supreme Court based on the certified conflict. On November 10, 2009, the Florida Supreme Court accepted jurisdiction on this case.

Statement of the Facts

In 2006, Mrs. Gomez purchased an investment property located at 9101 S.W. 69th Court, Pinecrest, Florida ("the property"). [R1: p. 24, lines 24-25; p. 20, limes 1-7]. She initially leased the property for one year to a third party. When that lease ended, she again marketed the property for rent, now, in late 2007. [R 1: p. 20, lines 24-25; p. 21, lines 1-7].

Mrs. Gomez received a telephone call from Martha Herrera ("Mrs. Herrera"). She was responding to a "For Rent" sign Mrs. Gomez had posted at the property. [R 1: p. 21, lines 12-23]. They met and negotiated a one year lease. Mrs. Gomez used a simple standard office supply-type residential lease, filled it out and gave it to Mrs. Herrera. Mrs. Herrera returned the lease to Mrs. Gomez (signed by her husband, Rolando) together with a photocopy of Rolando Herrera's Florida driver's license and the first month's rental payment. [R 1: p. 24, lines 21-24]. The Herrera's then took possession of the property under the leasehold. [R 1: p. 25, lines 1-4]. Mrs. Gomez would go to the property once a month thereafter to pick up the then due rental payment. [R 1: p. 25, lines 16-21].

About three months into the Herrera lease, and specifically, on January 17, 2008, the Village of Pinecrest ("Village") Police Department (allegedly) received an anonymous phone call of an armed burglary in progress at the property. [R1: p. 5, lines 4-7]. Responding Village police officers arrived immediately thereafter and entered the property, but found no burglars therein or around the garage of the property. However, they found marijuana plants growing inside the garage of property. [R 1: p. 28, lines 3-6].

The police officers never even attempted to locate or speak to the public records title owner, Mrs. Gomez. Rather, the Village sealed the property and

initiated a forfeiture action against it. Mrs. Gomez was served with a notice of forfeiture as the title/record owner of the property.

At the APH, the Village put on Village Police Officer J. Paez to establish that inside the property, he discovered a marijuana hydroponics/cultivation system containing several marijuana plants. On cross-examination, Officer J. Paez was questioned on what evidence he had that Mrs. Gomez knew or had reason to know about the unlawful activity at the property. The Village attorney objected. The court sustained the objection. Officer Paez never answered that particular question. But Mrs. Gomez' counsel, later in the cross-examination, asked Officer Paez a different question, targeted to make the same point that was not objected to:

"Did you find and [sic] evidence inside the residence, any evidence whatsoever inside the residence that would associate Ms. Gomez with the activities that are photographed in Exhibits 1-24?"[1]

His answer was:

"*I didn't*". [R1: p. 18, lines 4-14].

Mrs. Gomez testified. She affirmed that she owned the property; that she leased it to the Herreras; that she went to the property once in November and once in December, 2007 (to pick up the rental payments); that when she went there for that purpose, even though she never went inside the property she never saw, heard

[1] Exhibits 1-24 depicted the illegal marijuana hydroponics system inside the property.

or smelled anything suspicious at the property and that she had no knowledge or reason to believe that the property was being used for any criminal purpose. [R1: p. 25, line 25 and R1: p. 26, lines 1-4]. Mrs. Gomez' APH testimony was not refuted.

The Village argued that since probable cause had been established that the property had been used to cultivate marijuana, that Officer Paez's inability to attribute any owner knowledge to Mrs. Gomez (and Mrs. Gomez' "no knowledge" APH testimony), were irrelevant. [R1: p. 27, lines 23-25 and R1: p. 28, lines 1-4].

Mrs. Gomez argued that at an APH, there had to be at least *some* showing that she knew or should have known that the property was being used for an illegal purpose, relying on the only legal precedent on point, namely, *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573*, 798 So.2d 8 (Fla. 1st DCA 2001). [R 1: p. 28, lines 11-25 and R1: p. 29, lines 1-5].

The trial court agreed that Mrs. Gomez' lack of knowledge was irrelevant and ordered Mrs. Gomez' property seized. [A1] By operation of F.S. §932.703(1), following the APH, the Village immediately became the new owner of the property.[2]

[2] However, since then, the Village has not paid the mortgage, property taxes or insurance on the property. The property went into foreclosure. The house is abandoned and still contains all of the "aftermath" of the hydroponics system inside. All the Village has done for two years is occasionally cut the grass and issue code violations *to Mrs. Gomez.*

After Mrs. Gomez' oral argument at the Third District Court of Appeals, but *before* the Third District Court of Appeals wrote its opinion, the Fifth District Court of Appeals decided *Brevard County Sheriff's Office v. Baggett,* 4 So.3d 67 (Fla. 5th DCA 2009), which sided with the First District Court of Appeals' opinion in *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573*, 798 So.2d 8 (Fla. 1st DCA 2001).

Despite the holdings of the First and the Fifth District Courts of Appeals, the Third District Court of Appeals affirmed the lower court, but certified conflict with *In re: Forfeiture of a 1993 Lexus ES 300, Vin: JT8VK13T9P0196573,* 798 So.2d 8 (Fla. 1st DCA 2001) and with *Brevard County Sheriff's Office v. Baggett,* 4 So.3d 67 (Fla. 5th DCA 2009). See, *Zenaida Gomez v. Village of Pinecrest,* 34 Fla. L. Weekly D1340 (Fla. 3rd DCA 2009).

Issue on Appeal

Whether the adversarial preliminary procedure under Florida Statute §932.703 (2) is unconstitutional because it violates due process by not giving an innocent property owner a meaningful hearing in that he or she cannot present any defenses at this stage, according to the Third District Court of Appeals and, because it results in the taking of property from its owner before a final adjudication on the merits?

Standard of Review

The standard of review of in determining the constitutionality of a statute is de novo. *City of Jacksonville v. Cook*, 765 So.2d 289 (Fla. 1st DCA 2000).

Summary of the Argument

F.S. 932.703 (2) is unconstitutional because it violates minimum due process standards for property owners. Due process has two key components – notice and an opportunity to be heard. But the notice and opportunity to be heard at an APH are meaningless because the first stage of a forfeiture proceeding – the seizure part – has a strict liability standard.

Any "opportunity to be heard" in this provision is illusory since a property owner's words are "heard" but ignored in the probable cause/seizure determination. If the property has a nexus to a crime, it gets seized, *regardless of a seizing agency's total inability to prove at an APH, any indicia of owner knowledge.* An owner's true innocence and total lack of knowledge are totally irrelevant and immaterial at an APH. This strict liability standard at the APH as followed by the Third District Court of Appeals turns due process on its head and results in a taking of people's property as of the date of the APH order of seizure before there is a final adjudication on the merits of forfeiture.

Argument

As a threshold matter, it is plain that forfeitures are harsh extractions, not favored in the law or equity. *Brevard County Sheriff's Office v. Baggett,* 4 So.3d 67 (Fla. 5th DCA 2009). Since forfeitures are not favored in law or equity, forfeiture statutes must be strictly construed. See, *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991). Due process requires that at an APH a seizing agency should have to prove *some* guilty knowledge on the part of the owner for the property to be seized and for title to automatically passes to the seizing agency after the APH.

The *Mathews* Standard

At a minimum, due process requires that a property owner be afforded the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). For decades, the United States Supreme Court has applied a cost-benefit analysis, commonly referred to as the *Mathews* standard, to determine when and how citizens will have the right to have an otherwise unchecked government action reviewed by an objective decision maker. *Mathews v. Eldridge,* 424 U.S. 319 (1976). *Mathews* offers a time-tested, due process methodology that directs lower courts to balance four relevant factors: (1) the private interest affected by the official action, (2) the risk of erroneous

deprivation thorough the procedures used (3) the probable value of additional or substitute safeguards, and (4) the government's interest.

The *Mathews* framework is now the Supreme Court's preferred due process methodology whenever a right to private property clashes with a government interest. The Supreme Court has applied *Mathews,* or a *Mathews-like* process, to the impoundment of wages, (*Sniadach v. Family Finance Corp.,* 395 U.S. 337, 339 (1969)), license suspension proceedings (*Bell v. Burson,* 402 U.S. 535, 539 (1971)), filing fees in divorce proceedings (*Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)), termination of public assistance benefits (*Goldberg v. Kelly,* 397 U.S. 254, 263-271 (1970)), pre-judgment attachment of household appliances (*Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)), prejudgment attachment of personal property (*Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974)), termination of unemployment benefits (*Fusari v. Steinberg,* 419 U.S. 379, 383, 389 (1975)), termination of public utility service (*Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978)), temporary suspension of an employee for-cause (*Barry v. Barchi,* 443 U.S. 55, 66-67 (1979)), the conferral of veterans benefits (*Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)), termination of a public employee with a for-cause employment right (*Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985)), a banker's right to a post-suspension hearing (*Federal Deposit Insurance*

Corp. v. Mallen, 486 U.S. 230 (1988)), prejudgment attachment of real property (*Connecticut v. Doehr,* 501 U.S. 1, 19, 20 (1991)), a forfeiture claimant's right to a hearing prior to the seizure of real property (*United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993)); a public employee's right to pre-suspension hearing (*Gilbert v. Homar,* 520 U.S. 924 (1997)), and seizure of a car for parking violations. *City of Los Angeles v. David,* 538 U.S. 715 (2003). *See also Hamdi v. Rumsfield*, 542 U.S. 507, 524 (2004) (using *Mathews* to determine "what process is constitutionally due to a citizen who disputes his enemy-combatant status") (plurality opinion); *North Georgia Finishing v. Di-Chem,* 419 U.S. 601, 608 (1975) (striking down a statute that permitted prejudgment, impoundment of a bank account because the account was "put totally beyond use during the pendency of the litigation").

Application of the Mathews Standard to Real Property Seizures

1. The Private Interest At Stake Affected by Official Action

Under the *Matthews* test, since the type of property interests vary by context, the degree of due process is not the same for all categories of property. *Mathews* has guided the Supreme Court's due process methodology in forfeiture cases involving real property.

The Supreme Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), held that when the government seeks to forfeit someone's home, the owner is entitled to far greater protections than if only the forfeiture of personal property was at stake. In *Good,* eighty nine pounds of marijuana, vials of hashish, and drug paraphernalia were found on some property. *Good,* 510 U.S. at 46-48. The owner of the property was charged and eventually convicted. *Id.* After his conviction, a warrant was issued authorizing seizure of the land for forfeiture. *Id.* The property was seized and the rental income was held by the government pending the outcome of the forfeiture proceeding. *Id.* The owner claimed he had a constitutional right to notice and a pre-seizure hearing, and the Court agreed. *Good,* 510 U.S. at 62. The Court held that in addition to the warrant authorizing seizure of property and in addition to the forfeiture trial, the owner was entitled to pre-seizure notice and an opportunity to be heard. *Id.*

In *Good*, the precise issue was whether the government could "seize" real property for forfeiture without first affording the owner prior notice and a hearing. A prior decision of the Court, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), had permitted the government to seize a yacht subject to civil forfeiture without affording prior notice or a hearing. However, the Court in *Good*, refused to extend the *Pearson Yacht*, holding that due process requires a

pre-seizure hearing when the seizure involved real property, especially a person's home.

> Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance.... The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment.

James Daniel Good, 510 U.S. at 53-54.

In so ruling, the Supreme Court was especially critical of the government's argument that *ex parte* procedures were sufficient, noting that "'[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights....'" *Id.* at 55 (citation omitted). While the Supreme Court's holding applied to all real property and "not simply to residences," the Court added that it was nonetheless motivated by the fact that "[a] stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter in it." *Id.* at 61.

Where the seizure of real property is concerned, under *Mathews* and *Good,* the State should bear the burden of establishing the likelihood of forfeiture on the merits even at a lower standard at an APH than for final forfeiture.[3]

While F.S. § 932.702 provides for an APH, the nature of that hearing does not provide a "meaningful" measure of due process under the Third District's formulation. Meaningful due process is equivalent to an innocent owner not only

[3] Which is by clear and convincing evidence.

being listened to but in being heard in a way that actually affects the probable cause determination at an APH. If an owner chooses not to seek an APH or not to testify at an APH that is one thing. But when an owner timely demands an APH, attends and APH, and the state is unable to present even a scintilla of owner knowledge, probable cause should be denied. This becomes aggravated when the owner himself, or herself testifies and advances an innocent ownership defense at the APH itself. The statute effectively does not allow this to happen because any lack of (evidence of) any owner knowledge is totally ignored.

In every case, the Supreme Court held that pre-seizure notice and a hearing is necessary, unless exigent circumstances outweighed the citizen's right to uninterrupted enjoyment of her property. In those exceptional circumstances where pre-seizure notice was not feasible, the Court has consistently held that either a prompt, post-seizure hearing or the opportunity to post bond was constitutionally required.

In *North Georgia Finishing,* for example, the Court struck down a statute that permitted prejudgment, impoundment of a bank account because the account was "put totally beyond use during the pendency of the litigation." *North Georgia Finishing v. Di-Chem,* 419 U.S. 601, 608 (1975). The Court reached the same conclusion in *Sniadach,* where a state statute that allowed wage impoundments

without an interim hearing was deemed unconstitutional. *Sniadach,* 395 U.S. at 338-340. The wage earner had to wait for the trial on the merits, which meant that "in the interim the wage earner [was] deprived of his enjoyment of earned wages without any opportunity to be heard *and to tender any defense he may have....*" *Sniadach,* 395 U.S. at 339 (emphasis added).

2. The Risk of Erroneous Deprivation Through the Procedures Used

The second *Mathews* factor, the risk of an erroneous deprivation, is substantial. It does not make sense to defer review of the assessment of probable cause by prosecutors and agents beyond the time when it is possible to do so. *Gerstein,* 420 U.S. at 112-114. Law enforcement officers are not the final arbiters of probable cause. Therefore, every exercise of the forfeiture power involves a risk of error. A straight-forward decision, made with ample time to consider all options, by a disinterested decision maker, reduces the risk of error.

The government's interest in property seized for future forfeiture is diminished by the fact that the Supreme Court has held that the government has no property interest in potentially forfeitable property unless and until the government obtains a judgment in the proceeding. *United States v. A Parcel of Land (92 Buena Vista Avenue),* 507 U.S. 111 (1993). "Until the Government does win such a judgment, however, someone else owns the property...." 507 U.S. at 123-24, 127.

Accord United States v. Kaley, 579 F.3d 1246 (11th Cir. 2009) (Tjoflat, J., concurring, citing United *States v. Bailey*, 419 F.3d 1208, 1213 (11th Cir. 2005)). *Delaware Valley Fish Co. v. Fish & Wildlife Service*, No. 09-CV-142-B-W (D. Maine June 12, 2009), *2009 U.S. Dist. LEXIS 51089*, at **30-32 (rejecting FWS's argument that by seizing claimant's property under a civil forfeiture statute it could circumvent the application of § 853(e)'s procedures).

As noted at the outset, those procedures include: (1) placing the burden of production and persuasion on the government, (2) to establish a "substantial probability that the United States will prevail on the issue of forfeiture"; (3) a "substantial probability" that "failure to enter" a protective order or asset freeze "will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and (4) that "the need to preserve the availability of the property through the entry of the requested restraining order outweighs the hardship" on any claimant. *Accord, Delaware Valley Fish Co., 2009 U.S. Dist. LEXIS 51089*, at **31-32 (holding that the "onus is on the United States" at such a hearing "to justify the need for a protective order ... which does not necessarily correlate with an order condoning an indefinite seizure for the maximum duration of a pre-indictment investigation").

The court in *Delaware Valley Fish* recently applied these principles to order the return of a claimant's truck that had been seized by the U.S. Fish & Wildlife Service ("FWS"). The FWS filed a verified civil forfeiture Complaint but, after one year, no indictment had been returned, so the claimed sought a preliminary injunction for its return. The United States Attorney's Office then filed an affidavit with the court, stating that there was still a "criminal investigation" going on that the truck was "evidence of the alleged criminal violations and [was] forfeitable under applicable law." *Id.* at *7. Based on the affidavit, the government argued, based on 16 U.S.C. §1640(e)(3), that it was entitled to seize and retain the truck "'pending disposition in of civil or criminal proceedings....'" *Id.* at *12. Therefore, according to the government, the only time constraints "that exist for purposes of a due process hearing [were] the time frames that would apply to the deadline for instituting a criminal prosecution." *Id.* at *29. The district court rejected this argument, holding that since the stated intent was to indict and criminally forfeit the truck, the government could not evade the requirements of § 2461(c) and § 853. The court then ordered the truck returned to the claimant due to the year delay. *Id.* at *33.

A similar issue arose in *In the Matter of the Application of Kingsley For the Return of Seized Property*, 802 F.2d 571 (1st Cir. 1986). In that case, the government used the civil forfeiture provision in 21 U.S.C. § 881(a)(6) to seize the

home of the target of a criminal drug trafficking investigation, Kingsley. Seven months later, Kingsley was indicted. In the interim, he had tried unsuccessfully to obtain a preliminary injunction to review the government's conduct. However, by the time he finally reached the First Circuit, Lawson had entered into an agreement with the government that allowed him to live in the house under certain conditions. Although the majority opinion was extremely critical of the government's tactics,[4] it avoided reaching the merits of Kingsley's constitutional arguments on mootness grounds. In a dissenting opinion, Judge Torruella indicated he would have reached the constitutional issues. In addition, he criticized the government for using a civil forfeiture proceeding to circumvent Kingsley's pre-indictment procedural rights under (then) 21 U.S.C. § 853(b)(1) and (f). "I regard the Congressional weighing of due process considerations, set forth in the criminal forfeiture statute, not only as proper, but as mandated by the Constitution." 801 F.2d at 582-83, citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893 (1976).

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[4] The majority opinion thus stated:

> We agree with the district court that this case raises serious and disturbing constitutional issues. While civil forfeiture is always a harsh action, the seizure in this case was much more sweeping than ordinary seizures by customs officials or even seizures of large amounts property from suspected drug dealers. Here, the government effectively took everything that Kingsley had short of what he was wearing, and no hearing was provided for fifty days. Yet, under the government's sweeping interpretation of the forfeiture statute the seizure could have even included the clothes on Kingsley's back.

802 F.2d at 578.

The government had attempted a similar ploy in that case. Accordingly, even apart from the Claimants' rights under the Fifth Amendment, the government's conduct violated the clear intent of Congress to require prosecutors to use §853, with all its procedural safeguards, to effectuate pre-indictment restraints on the targets of a criminal investigation.

These principles have been extended to the civil forfeiture context. In an opinion authored by Judge, now Justice Sotomayor, the Second Circuit in *Krimstock v. Kelly*, 306 F.3d 40, 48-519 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003), the Second Circuit applied *Mathews* to the seizure of automobiles under a New York civil forfeiture statute. The court held that a prompt post-seizure hearing was required – i.e., an interim hearing between the initial seizure and forfeiture trial. *See also Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009).[5]

3. The Probable Value of Additional or Substitute Safeguards

There is zero probability of an additional substitute or safeguard where, as here, the lack of a meaningful APH results in the immediate deprivation of a person's property – in this case, of Mrs. Gomez' real property. Unlike most personal property, which is easily replaceable or fungible, real property is not

[5] The Seventh Circuit followed *Krimstock* in *Smith v. City of Chicago*, 524 F.3d 34 (7th Cir. 2008), but the Supreme Court, after initially granted a petition for a writ of certiorari, vacated the case on mootness grounds after the parties settled the case while the case was awaiting oral argument.

easily replaceable or substitutable. Indeed, Florida law recognizes that a man's home is his castle. In this case, although Mrs. Gomez did not live in the property as her primary residence, it was *her residence* nonetheless.

Specifically, Florida Statute 932.703 (1)(c) provides no additional or substitute safeguard for the seizure following an APH and the *immediate* vesting of title to the contraband article in the seizing law enforcement agency, other than the illusory "recovery provision" of Florida Statute 932.704 (9)(a) & (b) & 10. However, as discussed further below, these remedies are totally inadequate because they fail to bring the owner to the status quo ante.

4. The Government's Interest

There is no question that the government's interest in divesting owners of property, either purchased with ill gotten gains or used to commit certain offenses, is high. Indeed, forfeiture laws are a strong weapon in the war on crimes which, of course, include narcotics offenses. However, the government's interest cannot abridge an innocent owner's right to a meaningful due process hearing – here, the statutory APH – in order to further that objective.

THE FLORIDA CONTRABAND AND FORFEITURE ACT

Prior to 1995, lack of knowledge by the owner that property was being employed in criminal activity was a trial defense. But the Florida Contraband and Forfeiture Act ("the Act") was amended in 1995 to provide, in Section 932.706

(6)(a), that property may not be forfeited under the Act "unless the seizing agency establishes by a preponderance of the evidence that the owner either knew or should have known, under reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity." CH 95-265,§3 at 2315, Laws of Florida.

Following this amendment, the question remained whether, and to what extent, a showing need be made by a seizing agency of ownership knowledge above and beyond probable cause, *in a Section 932.703 (2)(c) adversarial preliminary hearing,* to maintain a seizure order and thereafter proceed with forfeiture.

This issue was first squarely decided six years later by the First District Court of Appeals in *In Re: Forfeiture of 1993 Lexus ES 300*, 798 So. 2d 8 (Fla. 1st DCA 2001). There, the seizing agency was the Department of Highway Safety and Motor Vehicles ("DSMV"). There, just like here, there was probable cause for the *initial retention* of the motor vehicle. However, the Lexus automobile, just like Mrs. Gomez' property, had been operated *outside of the owner's presence* [in violation of F.S. §322.34 (9)].

At trial and on appeal, the DSMV, just like the Village here, argued that at the APH, it was not required to provide evidence in contravention of the so called "innocent owner defense". *Id* at p. 10. However, the First District Court of Appeals

disagreed and held that "some preliminary showing of such owner knowledge" was required even *at the adversarial preliminary hearing stage.* The appellate court, citing *Real Property*, 588 So. 2d 961, specifically stated:

> "We accordingly hold that establishment of 'probable cause to believe that the property was...used in violation of the Florida Contraband Forfeiture Act' requires, among other things, a preliminary showing of a basis for belief that the owner knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity".
>
> *Id.* at p. 10

Eight years later, the Fifth District Court of Appeals followed suit in *Brevard County Sheriff's Office v. Baggett,* 4 So.3d 67 (Fla. 5th DCA 2009) where the (identical) issue as existed with Mrs. Gomez was presented- whether the seizing agency was required to show at the APH that the owner of a pick-up truck (used for an illegal purpose) knew or should have known that the truck was being used for such purpose.

The Fifth District Court of Appeals similarly noted that in 1995, the Act was amended to require that the seizing agency prove that the owner of the property was not innocent. Following the same reasoning as the First District Court of Appeals, the Fifth District Court of Appeals held that at least *some* owner knowledge was required even at the APH. The Fifth District Court of Appeals said, "we do not see how a forfeiture proceeding can be maintained if this showing is not made at the adversarial preliminary hearing". *Id.*

The Third District Court of Appeals opinion takes the opposite view which validates a part of the forfeiture statute that clearly violates the due process rights of property owners. This constitutional infirmity can have tremendous, irreversible consequences on innocent owners.

Florida Statute §932.703(1)(c) compounds this *immediate* due process violation because immediately following the APH, all rights to, interest in, and title to any property *seized*, vest with the seizing agency. Accordingly, the Third District Court of Appeal's holding means that even if a property owner is totally innocent of fault or knowledge of a third party's earlier unlawful use of the property – the owner gets absolutely no relief until there is a final trial on the merits, sometimes, many years later, relief that might never make the innocent owner whole.

The Third District Court of Appeals' response to these collateral consequences is that if owner knowledge could not be later proven at the final hearing, the owner still had a statutory remedy against the seizing agency, citing to F.S. §932.704(9)(b) and (10). However, this reasoning is flawed for several reasons.

First, the statutory remedy does not necessarily bring an owner to the status quo ante. It *only* gives the owner "reasonable loss of value of the seized property" and "payment to the claimant for any loss of income *directly* attributed to the

continued seizure of income producing property during the trial or appellate process". F.S. §932.704(9)(b).[6]

But, any recovery for "loss of income from the property" will not reverse a mortgage foreclosure which can easily finalize before a successful final forfeiture trial for the owner, resulting in the owner losing his/her own home – a loss from which for many people cannot recover with a "check" from the seizing agency. Nor will a check cure the owner's ruined credit for seven years as a result of the mortgage foreclosure on the owner's real property. And, any loss of income not *directly* caused by the seizure is totally unrecoverable.

Also, under Florida law, offers of judgment do not apply to forfeiture cases. See, *Rosado v. Bieluch*, 827 So. 2d 1115 (Fla. 4th DCA 2002). This "safe harbor" for seizing agencies takes pressure off of them to settle a forfeiture case because if/when a seizing agency rejects a reasonable offer from a claimant (who later prevails at a final forfeiture hearing), there is no attorney's fee remedy under Rule 1.442 or F.S. § 768.79.

This problem is further *compounded* by the fact that there is no *automatic* statutory award of attorney's fees for a claimant who prevails at trial, either. A successful claimant can *only* get an award of attorney's fees following a in one of two, situations each of which is set at a very high standard; that the *initiation* of the

[6] We also note that F.S. §932.704(10) gives a successful property owner/litigant a claim for attorney's fees but only under very narrow circumstances.

forfeiture was an *abuse of discretion*, or, if *after* the forfeiture action was commenced, the seizing agency *continued it in bad faith.* See, F.S. § 932.704(10). So, if a property owner prevails at a final hearing, but cannot prove one of the two threshold situations noted above, he/she cannot recover *any* attorney's fees incurred in successfully recovering their own property – an absurd result to say the least[7].

If we assume that an *average* forfeiture proceeding takes 150 attorney hours to bring to a trial, at an average hourly rate of $350.00 per hour, a successful claimant who cannot meet either of the two statutory thresholds to recover attorney's fees, will still lose *about* $50,000.00. And that number can easily double if the owner has to invoke the appellate process, as did Mrs. Gomez here.

With such a high threshold for a claimant to recover statutory attorney's fees and no relief available under the offer of judgment rule/statute, a seizing agency, without even a minimal showing of owner knowledge at an APH, can seize property for years, own it but do little to care for it, as did the Village here, later lose on the merits at trial, and leave insufficient recourse to the owner, who may also have to pay all of his/her attorney's fees. Thus, under the Third District Court of Appeals' holding, many innocent owners will *never* be made whole, even if they

[7] It is true that this provision of the statute also says that the statutory attorney's fee provision does not affect any "other" applicable attorney's fees rule or law or F.S. 57. But, if a successful innocent owner/litigant cannot meet the threshold of an abuse of discretion or, actual bad faith (under F.S. 903.704 (10)), then it is difficult to imagine how he/she could ever be successful under F.S. §57. And, there is no "other" applicable attorney's fee relief that a successful claimant could travel under.

ultimately prevail at a final forfeiture trial. Thus, the due process failure of the APH process can be very detrimental, *even for the successful property owner/litigant.*

A forfeiture action, particularly one involving real property also affects more than just the property owner. It also affects many innocent third parties (private and public institutions, neighbors, lien holders, mortgagees, insurance companies, counties and municipalities) as well.

Seizure of real property can affect real estate prices in the surrounding neighborhood, especially when the seized property is not maintained and/or becomes vacant or abandoned following the initial seizure. An owner cannot lease the property because it is seized and controlled by the seizing agency. If the owner cannot lease the property, any mortgage on it, insurance payments and property taxes, can go unpaid. The lender is then put at risk because the accruing/ defaulting debt may ultimately exceed the value of the property. The city and/or county lose the ability to collect property taxes on the property. The property may also go uninsured unless the lender (if the property has a mortgage) "force-places" insurance on it, placing the lender at even greater risk than otherwise.

None of these real-life, practical side effects upon innocent owners or innocent third parties of an ill-fated APH seizure order were considered by the Third DCA in its "prevailing- claimant recovery analysis".

Conclusion

Forfeiture places a substantial burden on innocent parties. While the Village has a bona fide interest in forfeiting property – whether real or personal – located within its jurisdiction, either purchased with criminal proceeds or used as an instrument of crime, the constitution requires that the taking of that property from an owner or proper claimant, be preceded by a due process proceeding. Due process, to be constitutionally effective must be meaningful. There is no meaningful due process to the adversarial preliminary hearing provision of the Florida Contraband and Forfeiture Act when there is no requirement that the seizing agency demonstrate – even by a mere showing – that the owner or claimant knew or reasonably should have known that the property subject to seizure and forfeiture was involved in a crime. The holdings of the First and Fifth District Courts of Appeals were well founded and should be followed by the Supreme Court.

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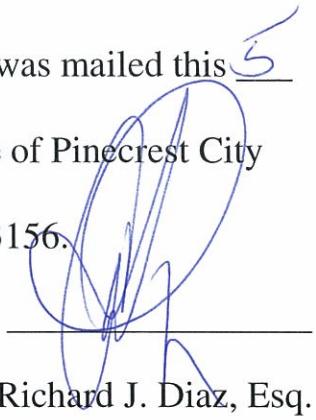
Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 5 day of January, 2010, mailed to: Cynthia Everett, Esq., Village of Pinecrest City Attorney, 7700 North Kendall Drive, Suite 703, Miami, FL 33156.



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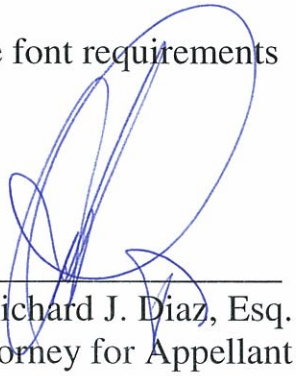

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